

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Pro Trak International, Inc.

v.

Civil No. 05-cv-342-JM

Protracker Software, Inc.

O R D E R

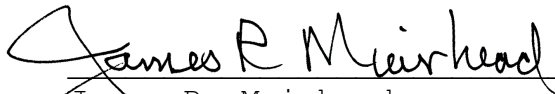
Plaintiff seeks to exclude the Le Boeuf Affidavit (Exhibit K, Document No. 28-12) and his testimony at trial that Marmen Computing had stopped using the PROTRAK mark prior to Marmen's transfer of the mark to plaintiff. Plaintiff's spin on the language of the assignment notwithstanding it appears clear that plaintiff had been told prior to the assignment that Marmen was no longer using the mark. Plaintiff's attorney stated in his July 13, 1998 letter "...if, as you indicated (in our telephone conversation), Marmen is no longer using the mark..." Document No. 28-8, Exhibit G. The court expects witnesses to tell the truth whether or not it is contrary to the language of an assignment, particularly where that language is crafted by a knowledgeable intellectual property lawyer in a way he knows to be contrary to the truth.

Mr. Le Boeuf will be permitted to testify in person or by deposition. Since he had fully disclosed Marmen's cessation of

use to plaintiff and it was plaintiff who drafted the assignment language, it is highly unlikely that Le Boeuf risks any civil or criminal liability. In fact, it is noteworthy that in the attestation Le Boeuf did not swear to the accuracy of anything in the assignment. Document no. 28-8, p. 2, Exhibit G. The affidavit is not admissible as a statement against interest.

The motion (Document no. 47) is denied.

SO ORDERED.



James R. Muirhead
United States Magistrate Judge

Date: October 17, 2007

cc: Counsel of Record